

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

WAL-MART STORES, INC.

Employer

and

Case 6-RC-11844

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 880 a/w UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL
UNION, AFL-CIO, CLC¹

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Leone P. Paradise, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.²

Upon the entire record³ in this case, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.⁴

¹ The name of the Petitioner appears as amended at the hearing.

² Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by August 17, 2000.

³ The Employer and the Petitioner timely filed briefs which have been duly considered by the undersigned.

⁴ In light of my determination herein that a unit of TLE employees is appropriate, I find that the Petitioner was not prejudiced by the Hearing Officer's decision not to direct the Employer to produce certain subpoenaed documents. Moreover, I note that the Petitioner did not take a special appeal of any of the

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(l) and Section 2(6) and (7) of the Act.⁵

The Petitioner seeks to represent a unit consisting of all full-time and regular part-time Tire and Lube Express (herein referred to as TLE) employees employed by the Employer at its New Castle, Pennsylvania, supercenter; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.⁶

The Employer contends, contrary to the Petitioner, that the petitioned-for unit is inappropriate as it is too limited in scope, and that the only appropriate unit must include all hourly paid employees working at the store. In addition, the Petitioner, contrary to the Employer, would exclude Department Manager of Automotive Christine Dannus and Service Manager Paul Cleckley on the basis that they are supervisors within the meaning of the Act.

Hearing Officer's rulings made at the hearing pursuant to Section 102.65(c) of the Board's Rules and Regulations. Under these circumstances, I decline to draw the adverse inference on the Employer's failure to produce certain subpoenaed documents as requested by the Petitioner in its brief.

⁵ Notwithstanding the Employer's assertion to the contrary (the Employer also failed to adduce any evidence in support of its assertion), the record evidence establishes, and I find, that the Petitioner constitutes a labor organization within the meaning of Section 2(5) of the Act. United Food and Commercial Workers Union, Local No. 880 exists for the purpose of dealing with employers concerning grievances, labor disputes, rates of pay, wages or other forms of remuneration, hours of employment, or other terms and conditions of employment. The Petitioner routinely negotiates labor agreements with employers on behalf of the employees whom it represents. The record indicates that the Petitioner has approximately 400 collective-bargaining agreements with various employers. Based on the foregoing, the Petitioner meets the definition of labor organization in Section 2(5) of the Act. See Roytype, Division of Litton Business Systems, 199 NLRB 354 (1972).

⁶ Although this unit is referred to in the record as having amended the unit description set forth in the petition, I note that the record does not reflect any formal motion to amend. However, at the hearing and in their briefs, the parties stated their positions as to the appropriateness of the above-described unit. For ease of reference the unit described above will be referred to as the petitioned-for unit.

There are approximately 17 employees in the petitioned-for unit and 420 employees in the unit urged to be appropriate by the Employer. There is no history of collective bargaining for any of the employees at issue herein.

The Employer, a Delaware corporation, is engaged in the operation of retail stores throughout the United States. Solely involved in this proceeding is the Employer's supercenter facility⁷ located in New Castle, Pennsylvania. The Employer's New Castle facility is a one-story building spanning 198,444 square feet. The supercenter is open 24 hours per day; however, certain areas, including the shop/service area of the TLE, have more limited hours.⁸ The facility is separated into 12 divisions,⁹ and each division is further subdivided into departments. In addition, there are several independent franchises located in the front of the facility, including a hair care salon, portrait studio, bank, video store and a McDonald's restaurant.

Store Manager Mark Eskra is responsible for the overall operation of the facility. Reporting to Eskra are two co-managers and seven assistant managers. The balance of the Employer's salaried management staff is comprised of the TLE manager, vision center manager, photo manager, produce manager, bakery manager, meat and deli manager and two pharmacists.¹⁰ The store manager conducts weekly management meetings on Monday

⁷ The record indicates that the Employer operates both stores and supercenters.

⁸ The TLE sales operation is open Monday through Saturday from 8 a.m. to 10 p.m. and on Sundays from 10 a.m. to 6 p.m. The service/shop area of the TLE has somewhat more limited hours. Services are performed from 8 a.m. to 8 p.m. on Mondays through Saturdays and from 10 a.m. to 6 p.m. on Sundays. Several other "specialty" areas of the store are, like the TLE, not continuously open. For example, the pharmacy closes at 7 p.m. Both the photo center and the vision center close at 9 p.m.

⁹ The divisions are listed by number and title as follows: Division 1-General Merchandise; Division 6-TLE; Division 10-Pharmacy; Division 11-Jewelry; Division 15-Shoes; Division 24-Deli and Meat; Division 25-Produce; Division 26-Frozen and Dairy; Division 27-Bakery; Division 28-Grocery; Division 30-Vision Center and Division 31-One Hour Photo.

¹⁰ The record clearly demonstrates, and I find, that Eskra is a supervisor within the meaning of Section 2(11) of the Act based on his authority to hire, discipline and fire employees and to determine certain of their working conditions. The record further establishes that TLE Manager Tim Albu has the authority to interview, transfer, discipline, assign and evaluate employees. Therefore, I find that Albu is also a supervisor within the meaning of the Act. The supervisory status of the rest of the salaried management staff is not before me; however, I note that neither party contends that these members of management should be included in any unit found appropriate herein.

morning at which all of the above-listed management staff is present. The assistant managers meet on a monthly or bi-monthly basis with hourly-paid department managers working under their direction. At this facility, Assistant Manager Richard Moury oversees the departments in the TLE and approximately 11 other departments.¹¹

The Employer utilizes a “store within a store” or SWAS merchandising concept, whereby certain divisions¹² have management personnel separate from the inner store management. With respect to the TLE, the structure is such that the TLE manager at this facility reports to a district manager¹³ who, in turn, reports to a regional manager, who reports to a divisional manager/vice president, who ultimately reports to the overall president of the Employer.¹⁴ The TLE division also has its own personnel manager.

The record establishes that a separate monthly profit and loss statement listing the sales and service, expense¹⁵ and profitability is maintained for each division within the store. This statement is posted in the particular division along with the store’s overall profit and loss statement.¹⁶ In the TLE, the division’s profit and loss statement is posted on the mission board in the TLE stockroom.¹⁷ A flat rate is charged for most of the services, as described herein,

¹¹ The two departments within the TLE division in which employees are employed are Department 10 (automotive sales) and Department 37(service). Christine Dannus is the automotive department manager. As of the time of the hearing in this matter, no one occupied the position of Department 37 manager.

¹² At this facility those divisions are: TLE, Vision, Pharmacy, Shoes, Jewelry and 1-Hour Photo.

¹³ The record reveals that TLE District Manager Ron Brewer visits the facility on a weekly basis for a period of two to eight hours.

¹⁴ The Employer’s brief does not adequately address the separate reportorial hierarchy of the TLE division.

¹⁵ One of the expenses on the TLE profit and loss statement is rent. The record indicates that the TLE division does not pay rent directly to the store. It appears that this entry is for home office bookkeeping purposes, and the amount of the rent is a percentage of the sales of the division.

¹⁶ The overall store profit and loss and the divisional profit and loss statements are also posted in the employee break room.

¹⁷ The mission board is a bulletin board.

performed in the TLE. Certain services, such as the installation of windshield wiper blades, are free with the purchase of the blades.

The automotive merchandise section of the TLE is physically located in the rear of the facility between the Hardware department and the Fabric and Crafts departments. Behind the automotive section is the TLE storage area, office and security room¹⁸ and customer waiting area. In back of this area is a portion of the building which extends out into the parking lot. The service garage area where work on vehicles is performed is in the portion of the building which is not open to customers. There are eight bays with bay doors leading to the parking lot in the service area.¹⁹ Employees and customers can enter the TLE store area by one of two doors which lead from the outside directly to that department, or they may enter the store through any of the other three store entrances.²⁰ The TLE also has a customer waiting room and a service desk.

The TLE manager, Tim Albu, is responsible for the TLE operation at the facility, including, but not limited to, recruitment and hiring of TLE employees, sales and profitability, floor merchandising, office functions and inventory. In carrying out these responsibilities, Albu sets the TLE monthly division goals as well as goals on the sale of individual items.²¹ In addition, Albu must approve the reduction of the price of any item sold in the TLE. In order to meet daily business needs, Albu can call in additional TLE employees, or direct TLE employees to stay late. The TLE manager must approve vacation request forms before these requests are transmitted to the personnel department.²² The TLE manager also approves requests for time

¹⁸ This room serves as an office for the TLE manager. Both he and the automotive department manager have keys to this room.

¹⁹ The service bays are locked at 8 p.m. when the TLE is closed. Only the store manager, two co-managers and seven assistant store managers have keys to the bays.

²⁰ The other store entrances are located near the grocery, general merchandise and garden center.

²¹ This information is recorded on a document entitled SWAS, and is posted on the TLE mission board.

²² The vacation schedule is maintained by the Personnel Manager. The record establishes that the Employer blocks off the vacation calendar one to two months before the holidays and during the month

off²³ and requests for a shift adjustment. The TLE manager is also responsible for completing annual performance reviews for TLE employees. Albu meets individually with the employee to discuss such reviews. Within the TLE, only the TLE manager can recommend a coaching of²⁴ or the issuance of discipline to employees.

Transfers to TLE are handled by Albu. Since Albu became TLE Manager three employees have transferred into the TLE.²⁵ Those individuals were interviewed solely by Albu. The record indicates that three TLE service technicians had recently bid on positions in other departments, but as of the hearing they had not been awarded the positions for which they bid.

Although it is unclear whether certain practices will continue under Albu's tenure as manager, the record indicates that the previous TLE manager, Nester Barrios, held TLE meetings every few months at which TLE employees discussed issues within their department.²⁶ In addition, Barrios sponsored social gatherings, such as cookouts, for TLE employees.

The petitioned-for unit consists of 14 service technicians, a stocker and two cash register operators.²⁷ Service technicians perform tire service, including repairing flat tires, balancing tires and installing new tires. Tire service requires the use of various equipment including vehicle lifts, air guns, tire-changing machine, tire spreader and the tire balancing machine.

before the annual store inventory. In Albu's absence, vacation requests are submitted to the store manager or one of the co-managers.

²³ Every employee at the facility has a name badge, the reverse side of which has a bar code. The employee "swipes" the badge in and out on the timeclock at the beginning and end of his or her shift.

²⁴ Coaching is the process whereby performance problems are discussed with an associate and a plan to correct the problem is devised. The store manager must approve all coachings and disciplinary actions.

²⁵ On June 24, 2000, three employees were transferred to the position of TLE service technician. Before June 24, these employees held the positions of unloader in receiving, stocker frozen and cashier.

²⁶ At one such meeting, Dannus complained that a TLE sales associate was not performing his job properly and recommended that he should be disciplined. Barrios apparently did not concur, as the sales associate was not disciplined.

²⁷ Cash register operators are also referred to as sales associates. There are approximately 150 sales associates working at the facility.

Service technicians also perform oil and filter changes, flush and fills, fuel injection system cleaning, cleaning and installation of batteries, replacement of wiper blades, and bulb installation.²⁸ If, in the course of his or her duties, the service technician damages a car part (e.g. breaks a wheel stud), the technician will obtain the necessary parts from an auto parts store and will repair the vehicle. In addition to the equipment listed herein, the service technicians utilize a variety of tools, including drills, torque sticks, tread depth gauges, socket and specialty wrenches, such as impact and torque wrenches. All tools are provided by the Employer. The record establishes that employees outside TLE do not temporarily fill in for service technicians and, likewise, service technicians do not temporarily fill in for sales associates in other areas of the store.

The stocker arrives at work between 5 a.m. and 6 a.m. to process the TLE freight which has been delivered to the general warehouse at the facility or to the TLE receiving area.²⁹ Freight is delivered to the general warehouse every night. The record indicates that one of the warehouse employees will deliver the “midnight box” to the aisle between the automotive area and the sporting goods area. The stocker then processes and shelves these items when he arrives at work each day.

The TLE sales associates operate the cash registers in the department when customers wish to purchase items from that department such as wiper blades, oil, air filters, car waxes, lights, SUV accessories and car paint. Sales associates are also responsible for helping customers locate items in the area.³⁰ The record indicates that the stocker and two of the

²⁸ Until several weeks before the hearing in this matter, the service technicians also re-charged air-conditioning units. The decision to discontinue this service was made by the TLE district manager. There is some indication in the record that the discontinuation of the air-conditioning service may be reconsidered.

²⁹ The record indicates that tires, bulk oil and batteries are delivered from vendors directly to the TLE stockroom which is separate from the general facility warehouse. One of Department Manager Dannus’ duties is to receive this freight. The TLE stockroom is locked and unlocked as needed by either the store manager or one of the two co-managers. The managers are alerted to unlock the TLE stockroom via a store page.

³⁰ There are 38 cash registers in the store, two of which are located in the TLE area.

service technicians can operate the TLE cash registers. Sales associates from other areas of the store can sell TLE products if a customer wishes to purchase these items at cash registers other than the registers located in the TLE area. During the hours of 10 p.m. to 6 a.m., when no TLE sales associate is on duty, customers have no choice but to purchase the automotive items elsewhere in the store. During these off hours, the cash registers in the TLE area are unusable because the department is closed. The record indicates that any product can be purchased at any cash register in order to meet a customer's need.³¹ On occasion during dayshift hours, customer service managers³² have operated one of the TLE cash registers. This has occurred in such instances as when a customer at the front register was not satisfied that the pricing of an item was correct, and when a TLE sales associate notified the facility that he would be arriving late to work.

The record contains some examples of TLE employees assisting and/or interacting with employees in other departments. Thus, the stocker's duties entail his going to a common stock room and trash area, during which time he may converse with other employees. At times, an associate from the toy department will come to the TLE to fill a bicycle tire with air. There is also evidence that pursuant to the store manager's directive, ten department managers³³ spent portions of two days cleaning the TLE.

Dannus testified that approximately twice per week, she assists customers in locating items in other departments such as hardware. She further estimated that approximately five times per day, a sales associate from another area will accompany a customer to TLE to refer the customer to a TLE sales associate. Approximately twice a day, the non-TLE sales associate will actually assist customers with TLE products. In addition, the department manager

³¹ All items for sale are identified by a uniform pricing code (UPC) which can be scanned at any cash register.

³² Customer service managers are responsible for overseeing the front end cashiers and ensuring that they have adequate change for their registers.

³³ In addition to Dannus, Service Manager Cleckley assisted in this clean up.

of Fabric and Crafts utilizes the TLE computer terminal to perform price checks. Approximately one year ago, Dannus and one of the then TLE sales associates worked in the stationery department for two days. During the same time period, one of the then-TLE sales associates assisted in the fabric and crafts area for a two-week period. Approximately one month before the hearing, Dannus and the stocker worked 15 to 20 minutes in the electronics department to help move a gondola.³⁴ The record also contains an example of a TLE sales associate returning items to the produce department after ringing up a customer's order.³⁵ Similarly, TLE employees have occasionally been asked to push shopping carts off the parking lot.³⁶

Two of the service technicians have been trained and have been issued the required "sign on" to operate the TLE cash register. Dannus estimated that a service technician operates the TLE cash register to ring an individual sale or to fill in for a TLE sales associate approximately five to ten times per week. The record also indicates that TLE sales associates are cross-trained to perform service technician duties.

The two service technicians who testified at the hearing had never performed any actual work in a department other than TLE. However, one had been approached by a customer who had a question regarding shoes. In accordance with the Employer's 10-foot rule,³⁷ the service technician accompanied the customer to the shoe department and referred the customer to an associate from that department. There is also evidence that one of the service technicians assisted with the repair of a broken shelf in the Fabric and Crafts department.

If automotive merchandise is returned, a customer service representative may request that a service technician verify that all parts on the returned item are present. Dannus interacts

³⁴ The record does not otherwise define gondola.

³⁵ Items sold by weight cannot be purchased at the TLE cash register because there is no scale.

³⁶ This task is generally performed by employees in the job classification of cart pusher. Apparently, neither of the current sales associates in TLE have performed these tasks.

³⁷ The 10 foot rule applies if an associate is within 10 feet of a customer. The associate is expected to greet and assist the customer, if necessary. At times this requires taking the customer to another area of the store. Once there, the associate will generally turn the customer over to a sales associate working in that department.

with the customer service department when a customer attempts to return TLE merchandise which has no UPC. Such merchandise cannot be returned directly to TLE and must be referred to customer service.

The Employer does not require specialized training for service technicians. However, the record indicates that the Employer prefers to hire service technicians with prior automotive experience and mechanical skills. In this regard, the record reveals that TLE Service Manager Cleckley has recruited at least three of the service technicians who are currently employed from the local automotive trade school.³⁸ Another applicant who was hired was told in his interview that prior training and automotive experience would be beneficial. Once hired, the service technicians are trained to perform their duties by the service manager and by the TLE manager. Experienced co-workers will also assist and demonstrate procedures to new service technicians.

There is evidence that service technicians begin their employment at the level three rate, which is the highest hourly wage rate,³⁹ of \$7 per hour.⁴⁰ Once hired, all employees undergo computer-based learning (CBL) with a hand-held computer. Approximately 80 percent of the CBL training consists of seven common tests which relate to general store information and procedures. The remaining 20 percent of the CBL relates to the specific procedures and information in the area for which the employee was hired. For example, one of the job specific CBL programs for employees hired to work in TLE relates to tire sales.

All store employees receive the same vacation, holidays, sick pay, health insurance, 401(k) plan and other benefits. All new employees, including new TLE employees, go through the same orientation program and receive the same orientation packet. All employees apply for

³⁸ A fourth service technician who had recently left the Employer's employ was also recruited from this school.

³⁹ Sales floor associates are hired at the level one wage rate of \$6.25 per hour; cashiers are hired at the level two wage rate of \$6.50 per hour. Employees who work during the night shift receive the higher level three wage rate as a shift differential.

⁴⁰ The two service technicians who testified at the hearing started at the level three wage rate.

work on a standard application form, and all employees are subject to an annual evaluation conducted by their area managers. All employees are able to use the employee break room. Employees are expected to park in the area of the parking lot designated for them. Upon entering the store through the door near the grocery area, employees punch one of two time-clocks which are located in a back hallway near the offices. There is also a stakeholder bonus program, through which every associate will receive a bonus based on overall store profits. The bonus amount paid to individual employees is determined by the employee's hire date. Daily storewide shift meetings are held for about 20 minutes at the beginning of each of the three shifts, during which the store manager announces the sales from the preceding day. Historically, the TLE associates have not attended these meetings. Rather, it appears that the TLE Manager and Automotive Department Manager Dannus attend each morning. When Dannus is unable to attend, the TLE Manager directs one of the other TLE employees to attend.

The record establishes that employees are subject to both storewide policies, and to divisional policies specific to their particular position. For example, all of the store associates are expected to comply with the Employer's 10-foot rule. In addition, the Employer's open door policy, as well as its attendance, harassment, smoking, and workplace violence policies, are common policies issued by the Employer's home office.⁴¹ A store safety committee exists which is composed of representatives of each division. Within the TLE, there are policies regarding the use of safety chains and procedures for closing service bays.⁴² The TLE also has unique safety policies on safety equipment because of the nature of the work performed there.

It appears that the TLE service technicians are the only employees who wear a full uniform consisting of a navy blue shirt and slacks.⁴³ Service technicians are required to wear

⁴¹ All policies issued by the home office are available on the Employer's information source known as the "pipeline". Employees have access to the pipeline via computers in the personnel office.

⁴² All of the Division policies are accessible through the CBL program.

⁴³ These uniforms are provided by the Employer. The weekly cleaning of the uniforms is performed by Cintas, an independent company.

safety glasses in the service area and a “bump cap” when they are changing oil, to protect from head injuries. If a work order requires the service technician to work near a motor, a burn sleeve is worn.⁴⁴ Service Manager Cleckley wears blue slacks like the service technicians but wears a white shirt. Dannus wears a red vest, as do customer service managers at the facility. The TLE stocker wears a blue vest. Likewise, the TLE sales associates also wear a vest. It appears that there are also 15 differently colored smocks worn in various areas of the facility, but none of the TLE employees wear a smock.

Job openings within the store are first posted outside the personnel office. Those who sign the posting are interviewed by the member of management who oversees the area with the job opening. Thus, if an employee wished to transfer to the TLE, TLE Manager Albu would interview the employee. It is customary to ask the permission of the employee's current division manager before approving the transfer. If no employee within the store meets the required criteria, the Employer must look outside the store for a qualified applicant.⁴⁵

At the facility, other departments utilize space near the TLE to display their product, and the TLE may utilize space in other departments in a cross-merchandising scheme. This process results in some contact between employees in various departments of the store. Products that are being cross-merchandised change throughout the year. For example, hunting equipment is displayed throughout the store in the fall, whereas sand and anti-freeze from the automotive department is displayed across the front of the store in the winter. Other examples of the Employer's cross-advertising methods include the announcement of specials over the public announcement system in the store and the distribution of one-stop shopping advertisements.

⁴⁴ A burn sleeve is a protective sock-like arm covering.

⁴⁵ The record indicates that, as of the hearing in this matter, Albu had not been involved in hiring a TLE employee from the outside. However, it appears that the prior TLE manager interviewed outside applicants who sought to become employed in the TLE.

It appears that within the past year, the employees working in TLE have utilized a unique computer program. The Bay Support System is a record of TLE customer information which has been entered into the system. The TLE employees access this information using a hand-held computer which is kept on the TLE desk. This system allows TLE employees to complete and record computerized work orders, thus obviating the need for hard copy work orders. The Bay Support System is only accessible to TLE employees as they are the only employees who have been trained on the system, and it will only respond to the bar code on the badges of TLE employees.

It is well established that in determining appropriate units for collective-bargaining purposes, the Act requires only that a unit be "appropriate" so as to insure to employees in each case the fullest freedom in exercising the rights guaranteed by the Act. There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Morand Brothers Beverage Co., et al., 91 NLRB 409, 418 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951). See also Omni International Hotel, 283 NLRB 475 (1987) and Capital Bakers, Inc., 168 NLRB 904, 905 (1967).⁴⁶ In addition, the unit sought by the Petitioner is always a relevant consideration, and the Board first considers the appropriateness of the unit sought by the Petitioner. Overnite Transportation Company, 322 NLRB 723 (1996).

The Board has stressed on many occasions that the Act does not compel labor organizations to seek representation in the most comprehensive grouping of employees unless such grouping constitutes the only appropriate unit. Thus, the inquiry here is whether the unit consisting of the TLE employees, as opposed to the unit of all store employees urged appropriate by the Employer, is appropriate in the circumstances of this case. Based on the

⁴⁶ Sears Roebuck and Co., 172 NLRB 1266 (1968) cited by the Employer also stands for this proposition. Indeed, the Board stated therein, ". . . a unit of less than all of the employees in a mercantile operation may be appropriate." (citations omitted)

record herein, I conclude that the petitioned-for unit of TLE employees constitutes an appropriate unit.

In the instant case, I recognize that the store employees are subject to common benefits, common overall supervision by the store manager and certain common policies and procedures. Moreover, a small degree of operational and functional interchange exists among the TLE employees and other employees in the store. Notwithstanding, these factors, I find, for the reasons set forth below, that a unit limited to TLE employees is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

The record herein establishes that the TLE employees have continuing daily interaction with each other. For example, Automotive Department Manager Dannus is in the bay area with service technicians 25 to 30 times per day, during which she works with the service technicians to the extent that she pulls vehicles into the service bay, washes windshields, vacuums vehicles and refills oil and fluids. In addition, Dannus works behind the service counter, writing and/or inputting work orders, until 10 a.m. each day. The sales associates in TLE also work behind the service counter each day. The record shows that Dannus, the TLE sales associates and the stocker spend the vast majority of their work time in the TLE area. When the work in the service area is slow, the service technicians stock tires and other products in the sales area of the TLE. Service technicians also interact with TLE sales employees when the technicians enter the automotive merchandise area to procure wiper blades, oil and bulbs from the shelves in the department, or when they utilize the screens⁴⁷ to get the proper blade, filter, bulb, battery or spark plug types. While there are examples of TLE sales employees, including Dannus, working temporarily in other departments on an as-needed basis, this does not separate the

⁴⁷ There are five separate touch screens on the TLE sales floor which provide information on wipers, oil and air filters, spark plugs, batteries and lights. Either the customer or any associate can obtain the information when the proper make and model of a vehicle are touched on the particular screen. When assisting customers in accordance with the 10-foot rule, associates from other areas occasionally use a touch screen.

TLE sales employees from the TLE service technicians so as to make the employees in the petitioned-for unit a non-homogenous grouping.

The TLE employees' strong community of interest, separate from other store employees, is evidenced by their separate immediate supervision and their separate "specialty" division supervision. Although customers can purchase automotive items around the clock, the TLE area is closed during the late evening and nighttime hours. The TLE also has separate department meetings, a separate work area, and the profitability of the TLE division is recorded separately. Based on the above, and the record as a whole, I find that a unit of TLE employees constitutes a functionally-integrated group with a sufficiently distinct community of interest so as to constitute an appropriate unit. Moreover, there is no bargaining history among this unit of employees, and no labor organization seeks to represent these employees as part of a broader unit.

The Board has found units limited to automotive center employees to be appropriate units. For instance, in Sears, Roebuck and Co., 261 NLRB 245 (1982), the Board reversed the Regional Director's finding that a single storewide unit was the only appropriate unit, and found that the petitioned-for unit of automotive center employees consisting of mechanics, tire and battery installers (who performed duties similar to the service technicians herein), parts employees, cashiers, service writers and a receiver in the automotive center constituted an appropriate unit.

In Sears, the Regional Director's determination that a storewide unit was appropriate was based on the role of the personnel department in hiring new employees and the common employee orientation. In addition, all store employees punched the same timeclock, received the same fringe benefits, utilized the same storewide entrance and break room, were paid weekly and transferred on a temporary basis between departments as needed, and were required to assist customers regardless of departmental lines. There, as here, the cash registers permitted customers to select merchandise from any department and pay at the register. The Board recognized these factors which militated against finding the requested unit

of automotive center employees to be appropriate. However, the Board noted the high level of interaction between the employees within the automotive center, and the comparatively limited interaction with other store employees, such that the temporary assignment to work in other departments, assisting customers in other departments, and ringing up merchandise from other departments had minor impact on the automotive center employees' day-to-day activities. The Board found that the strong community of interest shared by the automotive center employees was evidenced by their separate immediate and second-level supervision, their different working hours and separate vacation schedules, their departmental meetings, their separate and readily-identifiable work area, and, perhaps most importantly, their separate group identity, arising from working in a recognized product line separate and distinct from that of the retail store.

The Employer argues that the Board found the unit in Sears to be an appropriate unit because it included (in addition to five other job classifications) mechanics who performed the skilled mechanical work of engine tune-ups, front end alignments and brake overhauls. Contrary to the Employer's contention, the fact that the unit in the Sears case included mechanics was not the controlling factor; rather, the Board found that the automotive center employees as a whole had a sufficiently distinct community of interest to warrant their representation apart from the rest of the store. Similarly, in J.C. Penney Company, 196 NLRB 446 (1972), the Petitioner sought a unit limited to the automotive service employees, and the employer contended that only a storewide unit was appropriate. The Regional Director found, and the Board agreed, that a unit limited to the automotive service employees, which included service specialists, general servicemen, stock clerks and the service supervisor, was appropriate.⁴⁸ Moreover, the work performed by the employees involved herein, contrary to the Employer's assertions in its brief, appears to require both skill and training and is not within everyone's ability, even with an automobile owner's manual. The mounting and balancing of

⁴⁸ The Employer implies in its brief that a prerequisite for finding appropriate a unit limited to automotive center employees at a retail store is the existence of a "nucleus of skilled mechanical employees" within the unit composition. However, none of the cases cited by the Employer for this contention stands for the proposition that a separate unit of all automotive center employees cannot be found in the absence of a "nucleus of skilled mechanical employees."

tires, the use of hydraulic lifts, the lubrication of automobiles, and the installation of tires and batteries, among other things, can be both dangerous and problematic if done incorrectly.

The Employer cites Big "N" Dept. Store No. 3, 200 NLRB 935 (1972) in its brief for the proposition that where a store manager has day to day control, the existence of other management does not justify departure from the presumption that a storewide unit is appropriate. I note that in that case the petitioner was seeking a storewide unit, and the employer argued that a multi-facility unit consisting of 15 stores, or alternatively 7 stores, was appropriate. Big "N" Dept. Store is inapposite to the instant case wherein the Petitioner is seeking a unit of all employees in the TLE division.

There remains for consideration the status and unit placement of Department Manager Christine Dannus and Service Manager Paul Cleckley, who, as previously indicated, the Petitioner, contrary to the Employer, would exclude as supervisors within the meaning of the Act.

Both Dannus and Cleckley report directly to the TLE manager. Both are hourly-paid employees.⁴⁹ Both receive overtime if they work more than 40 hours per week. Neither Dannus nor Cleckley receives any additional or different benefits by virtue of their title.

The record indicates that Dannus works weekdays from 7 a.m. to 4 p.m. or from 5 a.m. to 2 p.m. Dannus performs the same duties as the TLE sales associate and stocker. As department manager, she performs certain additional duties, such as ordering merchandise. The record indicates that department managers throughout the store perform this duty within their particular department. If the stock on the shelves in the automotive department appears

⁴⁹ The record indicates that with the promotion to service manager and department manager, the employee receives a one-dollar per hour raise.

low, Dannus utilizes the Telxon⁵⁰ to check if additional quantities of the item in question are in stock in the store. If not, Dannus orders the products utilizing the Telxon.⁵¹

Dannus also monitors the in-stock items and ensures that the pricing on items is correct. When the Employer's headquarters office lowers or raises the price of an automotive item, Dannus is responsible for carrying out the change on the price code of each such item. Dannus' duties also include selling merchandise, utilizing the cash register and handling the return of damaged merchandise. Dannus merchandises and zones the department's products.⁵² As needed, Dannus will cut keys and assist in cleaning the department.

The record indicates that Dannus has no authority to hire, interview, transfer, suspend, discipline, discharge, lay off, recall, reward, promote, assign, adjust employee grievances, or evaluate other employees, or recommend such action. With regard to the direction of employees, the record indicates that Dannus, on occasion, has requested TLE employees to perform certain tasks, such as stocking the shelves and zoning the area. In addition, Dannus directed one service technician to build a wiper display. The refusal by an employee of Dannus' request in this regard would be handled by the TLE manager.⁵³ Thus, her direction appears to be routine in nature and does not establish supervisory status within the meaning of Section 2(11) of the Act.

With respect to the discipline and evaluation of employees, the record indicates that Dannus has no involvement in formal coaching, and has no input in the evaluation of department employees. The record contains some indication, however, that during a TLE

⁵⁰ The Telxon is a hand held computer used to scan the UPC code on store items. It is utilized to check inventory levels, to ascertain those items in the overnight shipment and to order merchandise. Dannus shares a Telxon with the pharmacy department.

⁵¹ There are also 30 to 40 sales associates in the store who have been designated as qualified to use the Telxon in their departments.

⁵² Merchandising and zoning simply mean displaying the merchandise and pulling merchandise from the back to the front of the shelf, respectively.

⁵³ The record indicates that this problem has not arisen.

meeting at which all TLE employees were present, Dannus recommended to the previous TLE manager that the TLE cashier be coached or otherwise disciplined. The record indicates that this recommendation was not followed and, further, it appears that any employee can advise management of the need to coach another employee. Thus, the record does not establish that Dannus has any meaningful role in the discipline or evaluation of employees.

Service Manager Paul Cleckley spends approximately 80 percent of his work time performing the same tasks as the service technicians.⁵⁴ The remaining 20 percent of his time is spent pulling cars into the bays for service technicians, selling tires or assisting on the sales floor. The record indicates that, at times, Albu also performs work in the service area.

Cleckley appears to have moderate involvement in the hiring process. The record contains evidence that Cleckley provided an applicant interested in the TLE area with the store's employment application, and received this application when the applicant returned it to the TLE area. When this applicant came to the facility for a second interview with the then-TLE manager,⁵⁵ Cleckley sat in for a portion of the interview. In addition, as previously noted, Cleckley has spoken or given seminars at a local automotive trade school apparently for the purpose of recruiting TLE service technicians. Cleckley sat in on the interview of one of these recruits, who was thereafter hired. The record further reflects that when Dannus was hired in 1996, the then-service manager apprised her that a position in TLE was available. After her application was received, Dannus' initial interview consisted of separate discussions with that service manager, the TLE manager and the store manager.⁵⁶ However, as stated previously, the final decision with respect to all hirings rests with the store manager.

⁵⁴ The job description for the TLE service manager lists the recruiting and hiring of TLE service technicians, coaching and recording information to be used by the TLE manager to address poor performance problems and to complete annual performance evaluations. Notwithstanding this job description, the record demonstrates that Cleckley does not hire or coach service technicians.

⁵⁵ This applicant's first interview was also with the TLE manager.

⁵⁶ Inasmuch as there has been no need to go outside the store to fill TLE openings since Albu became TLE Manager, it is unclear what role, if any, Cleckley will have in the hiring process. According to Albu, Cleckley has no responsibilities with regard to hiring.

The record indicates that Cleckley is the primary source from whom new service technicians learn their jobs. Thus, one service technician estimated that 60 to 75 percent of his training was provided by Cleckley, and 25 to 40 percent was provided from other service technicians. Cleckley also directs service technicians to perform tasks such as removing trash from the area, cleaning the pit, sweeping the bays and cleaning the restroom next to the TLE.⁵⁷ In certain cases, Cleckley has directed a technician to stop changing oil on one vehicle to service a battery on another. Cleckley also checks the work of technicians. In cases where a technician considers a vehicle to require more work than the Employer has the capacity to perform, he or she will consult with Cleckley or Albu. If they agree, the vehicle is declined for service.

Service technicians have discussed various scheduling concerns with Cleckley. The record contains two examples of service technicians communicating the need for time off to Cleckley and one example of two technicians requesting to switch shifts. With respect to the requests for a day off, Cleckley told one technician that he would tell the TLE Manager. In the other instance, Cleckley told the technician that he would check the schedule to make sure there was adequate coverage. Approximately 15 minutes later, Cleckley advised the service technician that he could have the day off as requested. The other example in the record involved two employees who wanted to switch days. In that situation, Cleckley checked the schedule and recorded the switch on the TLE schedule which was posted in the TLE office. The service technician involved had the impression that Cleckley did not need to advise higher management of the change. When a service technician communicated his need to change shift hours to Cleckley, Cleckley changed the hours as requested by the service technician and told that employee that he would so advise the TLE manager. The Employer maintains that Cleckley has no authority to independently set hours, and that his role in these instances was to communicate the technician's desire to management.

⁵⁷ There is an associate restroom located next to the TLE.

In the absence of the TLE manager, any request for vacation must be communicated to the store manager or one of the two store co-managers. Likewise, TLE employees cannot report incidents of tardiness to Dannus or Cleckley. This information must be reported to a member of management.

As to disciplinary coaching, the record contains one incident involving Cleckley. One of the service technicians complained to Cleckley regarding a coworker's use of a cell phone during work time. Cleckley then spoke to the offending technician in the parking lot in the presence of the technician who complained. Cleckley advised the technician that the use of cell phones during working hours was not permitted, and that a continuation of this conduct could result in a written coaching. There is no evidence in the record that this conversation constituted a formal coaching, or that the conversation was recorded in any way. Moreover, the record establishes that the store manager reviews all coachings and may override a coaching.

The Employer's procedure with respect to time adjustments is that a time adjustment sheet must be completed.⁵⁸ The record indicates that service technicians who have forgotten to punch in or out, have advised Cleckley or Albu. Both Cleckley and the TLE manager have signed the time adjustment sheet. Either Cleckley or the technician then deposited the time adjustment sheet in the envelope next to the time clock. The time adjustment sheet is retrieved and processed by the personnel manager. The record contains one example of a service technician who left work without clearance. Upon returning to work, the technician was informed by Albu that he was terminated. The decision to reverse the termination was made by the store manager after he met with the technician.

The Board has been frequently required to resolve issues involving the supervisory status of persons whose status is unclear, and each case turns upon the particular facts involved therein. The United States Supreme Court and the Board have noted that the legislative history of Section 2(11) of the Act reveals that Congress intentionally distinguished

⁵⁸ The time adjustment sheets are kept in the personnel office that is next to the time clock.

between “straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action.”

NLRB v. Bell Aerospace Company, 416 U.S. 267, 280-281 (1974). In order for an individual to be found to be a supervisor within the meaning of the Act, the individual must be vested with more than a title and the theoretical power to perform one or more of the functions enumerated in Section 2(11) of the Act. In addition, it must be shown that such power is exercised with independent judgment on behalf of management, and not in a routine, clerical, perfunctory or sporadic manner. Chicago Metallic Corp., 273 NLRB 1677 (1985). The Board and the courts have recognized that an employee does not become a supervisor merely because he has greater skills and job responsibilities than fellow employees or because he gives some instructions or minor orders. Byers Engineering Corp., 324 NLRB 740 (1997). Further, employees who are mere conduits for relaying information between management and other employees are not statutory supervisors. Bowne of Houston, Inc., 280 NLRB 1222, 1224 (1986).

The record herein establishes that Dannus and Cleckley both primarily perform the work of sales associate and service technician, respectively. Neither attends the weekly management meetings with the store manager. There is no evidence that either Dannus or Cleckley have any role in discipline or in the exercise of any independent judgment on behalf of management. Neither can independently grant time off. With respect to Dannus, the responsibility for maintaining and ordering an adequate supply of parts or merchandise and conducting a department’s inventory are not evidence of supervisory status as such activities are not included among the supervisory indicia of Section 2(11). Tri-City Motor Company, Inc. d/b/a Auto West Toyota, 284 NLRB 659, 661 (1987).

The record demonstrates that although Cleckley assigns tasks to other technicians, these work assignments are routine in nature. Likewise, Cleckley’s limited participation in the hiring procedure does not establish supervisory status. In any event, Cleckley has no authority

to hire on behalf of the Employer, and the record does not establish that he makes actual recommendations regarding hiring. Where supervisors like Albu and Eskra also participate in the process, it cannot be said that Cleckley has authority to recommend hiring within the meaning of Section 2(11) of the Act. See Ryder Truck Rental, Inc., 326 NLRB 1386, 1387-1388, fn. 9 (1998). Despite the fact that Cleckley is perceived by at least two technicians to be the supervisor, Cleckley possesses none of the primary indicia of supervisory authority, i.e. authority to hire, transfer, promote, suspend, discharge, lay off, recall, evaluate, reward, discipline employees or adjust their grievance. Thus, the supervision of the technicians is vested in Albu and Store Manager Eskra.

It is well established that the party asserting supervisory status has the burden of proving such status exists. Tuscon Gas & Electric Company, 241 NLRB 181 (1979). In this case that burden, which rests with the Petitioner, has not been met.

Based on the above, and the record as a whole, I find that Christine Dannus and Paul Cleckley are not supervisors within the meaning of the Act, and accordingly I shall include them in the unit found appropriate herein.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Tire and Lube Express employees, including the service manager and department manager of automotive, employed by the Employer at its New Castle, Pennsylvania, supercenter; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit set forth above at the time and place set forth in the Notice of

Election to be issued subsequently, subject to the Board's Rules and Regulations.⁵⁹ Eligible to vote are those employees in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁶⁰ Those eligible shall vote whether or not they desire to be represented for collective bargaining by United Food and Commercial

⁵⁹ Pursuant to Section 103.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed. The Board has interpreted Section 103.20(c) as requiring an employer to notify the Regional Office at least five (5) full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.

⁶⁰ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before August 10, 2000. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

Workers Union, Local No. 880 a/w United Food and Commercial Workers International Union,
AFL-CIO, CLC.

Dated at Pittsburgh, Pennsylvania, this 3rd day of August 2000.

/s/Gerald Kobell

Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
Room 1501, 1000 Liberty Avenue
Pittsburgh, PA 15222

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